

**United Methodist Home of New Jersey and 1115 Nursing Home & Service Employees, Union—New Jersey B, A Division of 1115 District Council, Hotel Employees & Restaurant Employees International Union, AFL-CIO, Petitioner. Case 22-RC-10817**

August 1, 1994

**DECISION AND DIRECTION OF SECOND ELECTION**

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND DEVANEY

The National Labor Relations Board has considered objections to an election held July 29, 1993, and the Acting Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 47 for and 58 against the Petitioner, with 5 challenged ballots, an insufficient number to affect the results.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the record in light of the exceptions and briefs,<sup>1</sup> and has adopted the Acting Regional Director's findings and recommendations, except as to the Petitioner's Objections 1 and 2.

*A. Introduction*

The essence of the issues raised by the Petitioner's Objections 1 and 2 is whether during the critical preelection period of June 14 to July 29, 1993, the Employer discouraged employees from voting for the Petitioner by refusing to grant them a wage increase that allegedly was due in July. The Acting Regional Director found that the Employer's withholding of a wage increase was not objectionable conduct. He concluded that there was no clearcut history of wage increases during the summer months, and assuming a wage increase was promised the employees in July 1993, the Employer's explanation for withholding it was "to avoid the appearance of impropriety due to the pending election." Accordingly, he recommended that these objections be overruled. We find merit to the Petitioner's exceptions to that recommendation, and we accordingly will set aside the election and direct a new one.

<sup>1</sup> In the absence of exceptions, we adopt, pro forma, the Acting Regional Director's recommendation to overrule Objections 3, 4, and 6.

We find no merit in the Petitioner's exceptions to the Acting Regional Director's recommendation to overrule its Objection 5. Chairman Gould finds it unnecessary to pass on this objection.

*B. Relevant Evidence*

The Acting Regional Director's Report on Objections sets forth the following relevant evidence taken from the statements and affidavits of four unit employees,<sup>2</sup> and an Employer's memorandum. Regarding the Employer's practice of granting wage increases prior to 1992, two witnesses stated that they received two annual increases, one on the anniversary date of hire and the other in July. One of the witnesses said, however, that prior to 1992 they received an increase only on their anniversary dates. Three witnesses agreed that in 1992 they received only one increase, in July 1992, while a fourth said she also received a second increase in December of that year. Regarding an increase in 1993, the witnesses stated that they were told by different representatives of the Employer, in conversations that occurred from late 1992 until June 1993, that they would receive a wage increase in July 1993. No wage increase was given at that time.

The Acting Regional Director's report describes two efforts by the Employer to explain its decision to withhold the wage increase in July 1993. According to one employee, at a meeting of unit employees in early July 1993, the Employer's administrator, Fred Heliene, stated that according to the Board's Rules the Employer could not give raises during the pendency of a representation election, in order to avoid the appearance of offering employees bribes for their votes. He added, however, that "if the union got in, our raises would be negotiable, and that if the union didn't get in, we would get our raises." Subsequently, the Employer issued to employees a memorandum, dated July 14, 1993, which stated that unit employees would not receive wage increases at that time due to the Employer's understanding of the Board's Rules which, the memorandum stated, "prohibit management from making any changes in working conditions during the time before the election." The memorandum added:

Should the election result in a decision by the employees to have Local 1115 represent them, the issue of a raise and other economic items will be considered at the bargaining table. Should the result be no union, management will act promptly after the election.

*C. Analysis*

It is well settled that an employer is required to proceed with an expected wage or benefit adjustment as if the union were not on the scene.<sup>3</sup> A limited exception to this rule permits an employer to postpone a planned wage or benefit increase as long as the em-

<sup>2</sup> We note that the report contains no denials by the Employer of the employee witnesses' assertions described there.

<sup>3</sup> *Atlantic Forest Products*, 282 NLRB 855, 858 (1987), and cases cited there.

ployer makes clear to employees that the increase will occur whether or not they select the union, and that the sole purpose of the postponement is to avoid the appearance of influencing the outcome of the election.<sup>4</sup>

The evidence establishes that (1) before the petition was filed on June 14, 1993, the Employer had decided to give the unit employees a wage increase of an unspecified amount in July 1993, (2) the employees were repeatedly told that they would receive, and thus they expected, a wage increase at that time, and (3) the Employer did not then give them the increase because of the pending election. Given the governing principles, we find it unnecessary to determine whether the wage increase, or the employees' expectation of it, rested on an established past pattern of July increases or simply on the representations of the Employer's representatives that were made to employees from late 1992 until June 1993. In either case, a wage increase scheduled for July 1993 and the employees' expectation of receiving one in that month has been established. The only question remaining is whether, in withholding the increase, the Employer satisfied the requirements for the limited exception set forth above. We find that it did not.

In postponing the expected July increase, the Employer failed to assure the employees that the increase would ultimately be given regardless of the election's outcome. To the contrary, the lasting message imparted to the employees, irrespective of any proffered statement of neutrality as the purpose for the postponement, was that receipt of a raise hinged on whether the Petitioner won or lost the election: that is, the increase was at best a matter for negotiation if the Petitioner won, but it was a certainty if the Petitioner lost. Thus, although Administrator Heliene told the employees at an early July meeting that the Employer would refrain from giving the increase in order to avoid the appearance of offering bribes for votes, he also bluntly told them that "if the union got in, our raise would be negotiable, and that if the union didn't get in, we would get our raise."<sup>5</sup> That statement was repeated in the

July 14 memorandum, albeit more subtly as a "raise and other economic items will be considered at the bargaining table" if the employees selected the Petitioner to represent them, but that "management will act promptly" should that choice be no union. Both statements placed the onus, therefore, on the Petitioner for the employees not receiving a wage increase in July. It is immaterial that in postponing the increase, the Employer might have been acting in the good-faith but mistaken belief that even the grant of wage increases that were due and expected had to be negotiated if the Petitioner became the employees' bargaining representative. *Dorn's Transportation Co.*, 168 NLRB 457 (1967).

Finally, the reason given in the July 14 memorandum for the postponement, i.e., that the Board's Rules "prohibit management from making any changes in working conditions during the time before the election," neither gave the employees a basis for deducing that the postponement of their July increase was to avoid the appearance of influencing their votes, nor assurance that they would receive an increase at least in some amount once the representational matter was settled. See *Times Wire & Cable*, 280 NLRB 19, 28-31 (1986). The memorandum thus did nothing to dispel the notion that the Petitioner was to blame for the employees not receiving their July wage increase. Indeed, it only served to emphasize the statements that followed it concerning the wage increase's dependency on the results of the election.

Accordingly, we find that the Employer's withholding of the July 1993 wage increase constituted objectionable conduct and that, hence, the election must be set aside and a second election conducted.

[Direction of Second Election omitted from publication.]

<sup>4</sup>Id.

<sup>5</sup>In concluding that the Employer was attempting to remain neutral in postponing the wage increase, the Acting Regional Director found that Heliene's statement concerning the negotiability of the increase

"if the Petitioner were victorious" constituted a "prediction of future events." We reject that finding, which is factually without support. Heliene's statement was directed only at the postponed July increase and the effect the selection of the Petitioner as the employees' bargaining representative would have on the granting of that increase. It was made wholly in connection with the Employer's withholding of that particular increase and no other. In no way did it suggest that the employees would get the raise even if the Petitioner won, although the amount would then be negotiable.